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TERUNTUM THEATRE SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

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COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
BAHARUDDIN SHAH JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: W-01-83-1998]

C

20 APRIL 2006

REVENUE LAW: *Income tax - Assessment - Appellant first assessed for real property gains tax on gain made on sale of property - Appellant then re-assessed for income tax - Whether DG of Inland Revenue estopped*

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from making re-assessment as appellant paid the first assessment and was issued a Certificate of Clearance - Whether re-assessment amounted to double taxation - Income Tax Act 1967, s. 4(a)

The appellant was assessed for real property gains tax under the

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Real Property Gains Tax Act 1976 ('RPGT') on the gain made by the appellant from the sale of property earlier purchased by the appellant ('the subject property'). The appellant paid the assessment sum and was issued a Certificate of Clearance by the respondent. Subsequently, the respondent informed the appellant

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that a re-assessment would be made for income tax under s. 4(a) of the Income Tax Act 1967 ('ITA') and that the real property gains tax paid would be transferred into the appellant's account. The Special Commissioners ('SC') and the High Court judge ruled in favour of the respondent. Hence, this appeal.

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Held (dismissing the appeal)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) Estoppel cannot be invoked against the DG of Inland Revenue when he is put to notice that an incorrect

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assessment has been made under the RPGT. The duty of both parties, the DG and the taxpayer, is to obey the law. There is no rule of law precluding the respondent from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. The respondent is, if the facts and

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circumstances warrant it, free to revise and discharge the assessment under the RPGT and raise an assessment under the ITA. (paras 18 & 19)

(2) The appellant was not subjected to double taxation. The evidence showed that the respondent, upon taking the position that the gains arising from the sale of the property was to be the subject of income tax, notified the appellant that the real property gains tax paid would be transferred into the appellant's account. (paras 20 & 21)

(3) The SC rightly took into consideration the following: (1) that the subject property were sold in parts with plans to subdivide them giving rise to a trading activity; (2) that steps were taken by the appellant which led to the maturing of the asset sold; (3) that a broker was appointed incurring travelling expenses and that there was a broker's commission of RM195,000 in connection with the sale of the subject property; and (4) that the appellant's Memorandum & Articles of Association enabled the appellant to traffic in land. Therefore, the SC was right in concluding that the appellant's actions clearly suggested trading. The SC was also right in rejecting the appellant's contention that the sale in question was a forced sale due to the rejection by the relevant authority of a plan to build a cinema. No evidence was led to show why the appellant could not proceed with the development of the subject property since the relevant authority had approved it for limited commercial use. Therefore, it could not be said that the subject property was of no use to the appellant. (paras 41, 42 & 43)

Bahasa Malaysia *translation of headnotes*

Perayu telah ditaksir berkenaan cukai keuntungan harta tanah di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('RPGT') atas keuntungan yang dibuat perayu atas penjualan hartanah yang dibelinya sebelum ini ('hartanah tersebut'). Perayu membayar jumlah yang ditaksir dan telah diberikan Sijil Pelepasan oleh responden. Berikutnya, responden memberitahu perayu bahawa satu pentaksiran semula akan dibuat bagi maksud cukai pendapatan di bawah s. 4(a) Akta Cukai Pendapatan 1967 ('ITA') dan bahawa cukai keuntungan harta tanah yang dibayar perayu akan dimasukkan ke akaun perayu. Pesuruhjaya Khas ('SC') dan Mahkamah Tinggi membuat keputusan yang berpihak kepada responden dan perayu merayu.

Diputuskan (menolak rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Estopel tidak boleh dilaksana terhadap Ketua Pengarah Jabatan Hasil bilamana notis diberi kepadanya bahawa suatu taksiran yang silap telah dibuat di bawah RPGT. Tanggungjawab kedua-dua pihak, iaitu Ketua Pengarah dan pembayar cukai, adalah untuk mematuhi undang-undang. Tidak terdapat sebarang kaedah undang-undang yang menghalang responden dari membuat taksiran di bawah RPGT dan kemudian meneruskan taksiran di bawah ITA. Jika fakta dan keadaan mengizinkan, responden bebas untuk menyemak dan membuat taksiran di bawah RPGT serta membangkitkan taksiran di bawah ITA.

(2) Perayu tidak tertakluk kepada pencukaian berganda. Keterangan menunjukkan bahawa responden, sewaktu mengambil pendirian bahawa keuntungan yang diperolehi dari penjualan hartanah patut dikenakan cukai pendapatan, telah memberitahu perayu bahawa cukai keuntungan harta tanah yang sudah dibayar akan dimasukkan ke dalam akaun perayu.

(3) SC telah dengan betulnya mengambil pertimbangan akan hal-hal berikut: (1) bahawa hartanah tersebut dijual secara berperingkat dengan cadangan untuk memecah-bahagi sekaligus membangkitkan satu aktiviti niaga; (2) bahawa langkah-langkah telah diambil oleh perayu yang mana telah mematangkan aset yang dijual; (3) bahawa broker telah dilantik yang menyebabkan pembayaran biaya perjalanan dan komision broker sebanyak RM195,000 juga dibayar berkaitan penjualan hartanah; dan (4) bahawa Memorandum dan Artikel Persatuan perayu membolehkan perayu berurusniaga dalam hartanah. Oleh yang demikian, SC betul apabila merumuskan bahawa tindakan perayu adalah menjurus kepada perniagaan. SC juga betul apabila menolak hujah perayu bahawa penjualan adalah penjualan terpaksa disebabkan cadangan untuk membina panggung wayang telah ditolak oleh pihak berkuasa. Tiada keterangan dikemukakan mengapa perayu tidak boleh meneruskan pembangunan hartanah tersebut sedangkan pembangunan komersial secara terhad di situ telah pun diluluskan oleh pihak berkuasa berkenaan. Oleh itu, ianya tidak boleh dikatakan bahawa hartanah tersebut tidak lagi berguna kepada perayu.

Case(s) referred to:
Maritime Electric Co Ltd v. General Diaries Ltd [1937] AC 610 ***(refd)***
Pickford v. Quirke 13 TC 251 ***(refd)***

Legislation referred to:
Income Tax Act 1967, s. 4(a)
Real Property Gains Tax Act 1976

For the appellant - Cyrus Das (T Sughar with him); M/s Shook Lin & Bok
For the respondent - Hazlina Hussain (Ahmad Khairuddin Abdullah with her)

[Appeal from High Court, Kuala Lumpur; Tax Appeal No: R-2-14-6-1996]

Reported by Usha Thiagarajah

JUDGMENT

Zaleha Zahari JCA:

[1] Two issues arise for determination in this appeal. Firstly, after having assessed the appellant for real property gains tax under the Real Property Gains Tax Act 1976 (RPGT), and upon payment of the sum assessed and a Certificate of Clearance issued, whether the respondent could vacate the assessment and re-assess the appellant for income tax on the same receipt as a trading gain under the Income Tax Act 1967 (ITA)?

[2] Secondly, whether on the merits, the Special Commissioners were correct in concluding that the sale of the lands amounted to a trading in land constituting an adventure in the nature of trade and not a realization of capital asset?

[3] The findings of the Special Commissioners and upon which their conclusions were based have been clearly set out in the Case Stated. The Special Commissioners and the High Court Judge ruled in favour of the respondent on both issues. Hence, this appeal.

The Facts

[4] By a sale & purchase agreement dated 10 March 1973 ("the acquisition agreement") the executors of the estate of the late Loke Wan Tho agreed to sell the following properties in undivided shares to the nominees of the appellants ie,:

C.T. No.	Lot No.	Section	Area
13475	35	67	1 acre
13476	36	67	1 acre
13469	37	67	2 acres

Jalan Bukit Bintang in the Town and District of Kuala Lumpur for the agreed price of RM2,331,480 ("the subject properties").

[5] The material clauses of the acquisition agreement for consideration of the issues in this case are cls. 2 and 7. The proviso to cl. 2 provides that if it transpires that the area occupied by the cinema hall referred to in cl. 7 exceed an area of 30,000 square feet the purchase price of the subject properties shall be reduced to the extent of RM6.50 per square foot of the area of any such excess or the sum of RM52,000 whichever shall be the lesser.

[6] By cl. 7 the appellant *inter alia* covenanted that they would use their best endeavors to cause the appropriate authority to convert the zoning affecting the subject properties so as to permit the erection of a cinema-hall thereon (cl. 7 (a)). In cl. 7(b) the appellant covenanted that they would build on the said properties at least one cinema hall with a seating capacity of 1200 people or more for the purpose of exhibiting to the public motion pictures the area of which together with its parking area occupying not less than 30,000 square feet of land. The proviso to cl. 7 then provides that if the appropriate authority shall not give their approval for the erection of a cinema – hall upon any part of the subject properties, then cl. 7 would be rendered null and void and the purchase price of the subject properties would be revised to be in the sum of RM2,613,600 and the balance purchase price referred to in cl. 2(c) is revised to RM1,447,860.

[7] The purchase price was paid by way of a bank loan bearing interest and the subject properties produced no income to the appellants.

[8] On 2 May 1978, the appellants applied to the Dewan Bandaraya Kuala Lumpur ("DBKL") for conversion of land use of the subject properties from "residential" to "limited commercial" and planning approval, which application was approved on 21 March 1979. Be that as it may, the plan for the building of a cinema was rejected by DBKL and the appellant did not appeal against this decision.

[9] The appellant had incurred development charges in the sum of RM265,000 and also took steps to evict squatters present on the subject properties.

[10] By a sale & purchase agreement dated 4 December 1980 between the appellant as vendor, and Tessin Development Sdn. Bhd. ("Tessin"), the appellant sold to Tessin 155163/174240 undivided share of the subject properties for a sum of RM10,000,000. This price was later modified by a supplementary agreement dated 11 December 1981 after the rejection of the appellant's plan for the construction of the cinema.

[11] Subsequently, by another sale & purchase agreement dated 29 February 1984 the appellant sold 18,816 square feet representing 19077/174240 undivided share of the subject properties to Temana Sdn. Bhd. ("Temana") for the sum of RM13,171,200.

[12] The area of the subject properties which the appellant retained after the sale to Tessin and Tenama was 18,816 sq.ft. or 11% of the subject properties.

[13] The Schedule of Development Expenditure of the appellant as at 30 November 1982 shows, *inter alia*, that a sum of RM195,000 was paid as broker's commission as well as a sum of RM490 as traveling expenses in connection with the sale.

The Assessments

[14] The appellant was assessed to real property gains tax under the RPGT on the gain made arising from the disposal of the property in issue and a Certificate of Clearance was issued after the sum assessed was paid.

[15] There was then a change of mind. Revenue took the position that the gains from the sales by the Appellant should be subjected to income tax under s. 4(a) of the ITA and not real property gains tax under the RPGT. In consequence of this change of stand, the respondent informed the appellant that an amended assessment would be issued and the real property gains tax paid would be transferred to the appellant's account.

[16] The gain made by the appellant arising from the sales was then assessed to income tax under s. 4(a) of ITA. Notice of Additional Assessments under the ITA was issued year of Assessment 1983 and year of Assessment 1985.

A **First Issue**

[17] The crux of the arguments of the appellant taken by way of preliminary issue was that once an assessment for capital gains tax had become final by reason of the capital gains tax having been B paid and Certificate of Clearance issued, from then onwards, the matter became final and conclusive. It was the appellant's case that revenue was precluded from raising an assessment to income tax by reason of:

C (a) the finalizing of the capital gains tax assessment estopped Revenue from proceeding with the assessment for income tax;

(b) to do so would amount to double taxation.

[18] Estoppel is a rule of evidence which can only be invoked in D special circumstances. The estoppel relied upon by the taxpayer against revenue in this case is that of estoppel in pais, ie, estoppel by words or conduct. In our view the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. E Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate F law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable. In such a situation the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law. No person G can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (*Maritime Electric Co. Ltd v. General Diaries Ltd.* [1937] AC 610 at pp. 620-621). The duty of both parties, the Director General and the taxpayer, is to obey the law.

H **[19]** We therefore agree with the conclusion that there is no rule of law precluding revenue from discharging the assessment under the RPGT and proceeding with an assessment under the ITA. That revenue is, if the facts and circumstances warrant it, free to I revise and discharge the assessment under the RPGT and to then raise an assessment under the ITA.

[20] On the issue of double taxation, we agree that the position in Malaysia is different from that in England. The ITA applies only to income, whilst the RPGT applies only to capital gains on real property. It has to be either one or the other, it cannot be both. Unlike in England, the question of subjecting a taxpayer to both taxes in respect of the same receipt cannot arise here. The authorities cited by the appellant on this issue are clearly distinguishable.

[21] We agree that the appellant has not been subjected for double taxation in this case. The appellant is not subjected to two different charges in respect of the same receipt as it has not been charged for both real property gains tax under the RPGT and income tax under the ITA. The evidence shows that revenue, upon taking the position that the gains arising from the sales was to be the subject of income tax, notified the appellant that the real property gains tax paid would be transferred to the appellant's account. The complaint is thus unwarranted.

[22] In these circumstance we hold that the Special Commissioners and High Court judge had correctly rejected all issues raised by the appellant by way preliminary objection. The decision on the first issue is accordingly affirmed.

Second Issue

[23] The question for determination here is whether the Special Commissioners were correct in holding that the gain made from the sale of the subject properties was not a realization of a capital asset but income subject to s. 4(a) of the ITA?

The Appellant's Submission

[24] The arguments of the appellant's counsel may be summarized as follows:

[25] The appellant contends that the evidence show that the subject properties had been purchased as an investment for the purpose of erecting a cinema ie, letter dated 6 April 1972 from the vendor to the appellant which expressly subjected the sale to the construction of at least one cinema hall on the subject properties (p. 71 appeal record) as well as cl. 7 which requires the erection of a cinema hall subject to approval being obtained. At the time of purchase there was thus no intention to sell or deal in land as stock in trade.

[26] According to the appellant what happened in this case was that when cl. 7 of the acquisition agreement became "null and void" upon DBKL not approving the erection of a cinema hall, the intention to build a cinema was frustrated. The fact that cl. 7 became null and void does not distract from the fact that the dominant intention of the appellant was to erect a cinema building with related supporting facilities.

[27] According to the appellant the Special Commissioners erred in not giving consideration to the fact that no development of the asset was undertaken for the first five years, which meant no maturing of the asset. The conversion of the category of land use, the eviction of the squatters on the subject properties and the sums spent as development expenditure and pre-operational costs, were but in furtherance of the intention to build a cinema hall and supporting infrastructure facilities. Such conduct should not be construed as maturing the asset for trading purposes as such acts were consistent with the purpose of investment in the said land.

[28] As to the expenses incurred in disposing of the land through a broker, this was because the initial intention for the acquisition was frustrated. The sales of the undivided lots of the subject properties were forced sales after the rejection by the DBKL of the plan to build a cinema hall after a long interval of time between acquisition and sale.

[29] As to the fact that the subject properties produced no income, the appellant's counsel submitted that it is not necessary for an asset to be an investment to produce income. There is equally no principle that, for an asset to be an investment, it must not be financed by borrowed funds. In respect of the appellant's Memorandum of Association authorizing, *inter alia*, the trafficking in land and the sale of the land being in accordance with the activities of the company, there was nothing to show that the appellant was trafficking in land.

[30] The proceeds from the sale of the subject properties were in the circumstances of the present case capital in nature being proceeds from the sale of an investment and therefore were not subject to income tax. This court was urged to allow the appeal with costs.

The Respondent's Submission

[31] He submitted that the Special Commissioners were correct in making the findings which they did and that they had applied the correct principles.

[32] Intention is not the paramount consideration and consideration was rightly given the acts and conduct of the appellant in this case (*Iswera v. Ceylon Commissioners of Inland Revenue* The Annotated Cases Vol, XLIV 1965 157). The evidence clearly established that the dominant purpose of the appellant was to purchase the whole land subject to a subsidiary purpose of erecting a cinema on a portion of the land.

[33] Revenue's counsel in his submission highlighted the following:

(a) the cinema hall together with the parking area of not less that 30,0000 square fee (the cinema land) occupies only 20% of the total area of the land acquired;

(b) only cl. 7 is rendered null and void if approval to build the cinema is not obtained; that even if there was non-approval of the erection of a cinema, the purchase would still be effected. Thus, upon DBKL not approving the erection of the cinema and cl. 7 becoming null and void, the appellant could no longer rely on cl. 7 to support their argument that the land was acquired as an investment;

(c) the non-cinema land is not subject to any restriction, condition and limitation;

(d) the long period of five years taken to submit the plan for approval (in 1978);

(e) the fact that the appellant took steps which led to the maturing of the asset, ie:

(i) conversion of the land from residential to limited commercial;

(ii) incurring costs such as development expenditure and pre-operational activities;

(iii) the eviction of squatters, one year after the disposal of the undivided share of the land to Tessin;

(f) the fact that the land was sold in parts with plans to subdivide thus giving it the characteristic feature of trading activity;

(g) Special exertion made to find and attract purchasers by appointing a broker incurring RM195,000 as broker's commission and traveling expenses.

[34] The respondent's counsel submitted that the Special Commissioners were right to reject the appellant's contention that the sales were "forced sales" consequent to the non-approval of the erection of a cinema hall. No evidence was adduced to show why the appellant could not proceed with the development of the subject properties as DBKL had already approved the subject properties for limited commercial use.

[35] It was argued that the Special Commissioners had correctly weighed all of the evidence in arriving at the conclusions which they did. The appellant's appeal should accordingly be dismissed with costs.

Findings On The Second Issue

[36] Has the Special Commissioners examined all the facts and circumstances of the case? Did they apply the correct principles in arriving at the decisions and conclusions which they did?

[37] Upon careful perusal of the record and the reasoning given in arriving at the decisions which they did, we see no basis whatsoever in disturbing any of them. We hold that the Special Commissioners had carefully considered the evidence, that the factors taken into consideration were relevant and they had applied the correct principles.

[38] On "intention", this word connotes a state of affairs which the party "intending" does more than merely contemplate. It connotes a state of affairs which, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition.

[39] In the present case the appellant cannot be said to "intend" to build the "cinema – hall" as the building of one is subject to the approval of DBKL, something which is wholly beyond their control. The appellant cannot be said to "intend" its occurrence, though it may be not wholly uninfluenced by the appellant's will,

as it is dependent on so many other influences or circumstance, but, if it is achieved, the appellant's volition would have been no more than a minor agency collaborating with, the factors which predominately determine its occurrence. On the facts of this case the term "intention" to build a cinema is unsatisfied as the appellant has too many hurdles to overcome or too little control of events.

[40] The Special Commissioner's analysis of the evidence was clearly a very careful and detailed one, in respect of the terms and conditions of the acquisition agreement, the effect if approval of the erection of a cinema was not given, and its consequential effect on the agreement executed.

[41] We hold that the factors which the Special Commissioners took into consideration were indeed relevant and material in respect of the issues for determination before them, *inter alia*:

(a) The fact that the subject properties were sold in parts with plans to subdivide them giving it the characteristic feature of trading acitivity. (*Pickford v. Quirke* 13 TC 251 at 263);

(b) The fact that steps were taken by the appellants which lead to the maturing of the asset sold;

(c) The fact that a broker was appointed thus incurring traveling expenses and broker's commission of RM195,000 in connection with the sale of the land;

(d) The fact that the Appellant's Memorandum & Articles of Association enabled the appellant to traffic in land.

[42] Having regard to the evidence presented before the Special Commissioners we agree that it was open to the Commissioners to arrive at the conclusions which they did and in answering the second issue in the respondent's favour. In our judgment the Commissioners had asked themselves the right questions, correctly instructed themselves, as to the relevant law and were right in concluding that the appellants actions clearly were suggestive of trading.

[43] We also hold that the Special Commissioners were also right in rejecting the appellant's contention that the sales were forced sales upon rejection by DBKL of a plan to build a cinema by reason of no evidence being led showing why the appellant could

not proceed with the development of the subject properties (if indeed investment was their true motive) as the subject properties had already been approved by the DBKL for limited commercial use. Thus it cannot be said that the subject properties were of no use to the appellant.

Conclusion

[44] In conclusion we hold that the High Court Judge was right in upholding the Special Commissioners' findings on both issues and in affirming the decision that the transactions entered into by the appellant amounted to an adventure in the nature of trade and the gains from the sale of the landed properties in issue were revenue receipts taxable under s. 4(a) of the ITA.

[45] The appeal is accordingly dismissed with costs and the deposit be paid to the respondent on account of taxed costs.

[46] My learned brothers Haji Abdul Kadir bin Sulaiman and Tengku Baharuddin Shah bin Tengku Mahmud have seen this judgment in draft and have expressed their agreement with it.